No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1951

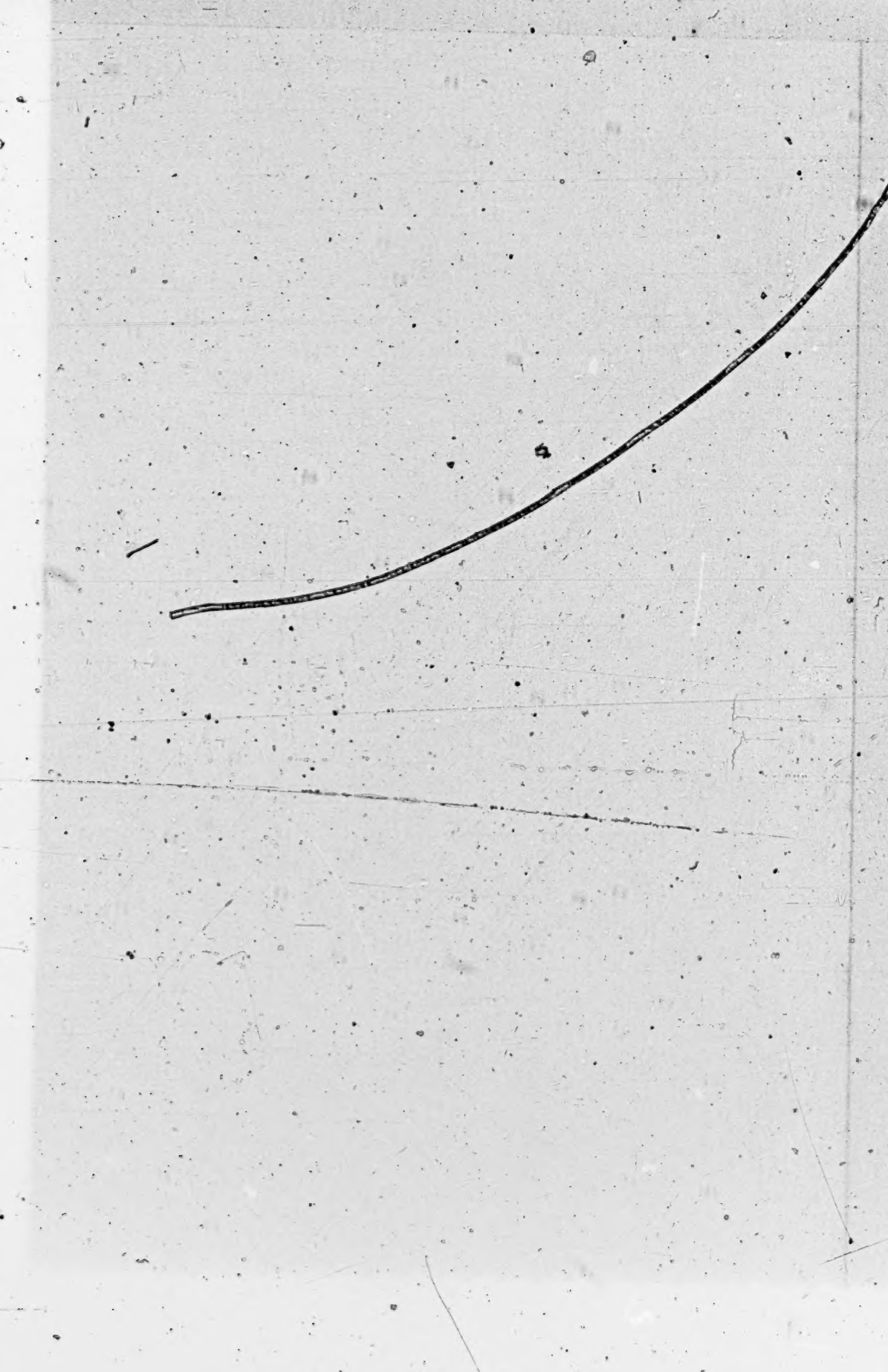
JOSEPH MANDOLI, ALSO KNOWN AS
GUISEPPI MENDOLIA, PETITIONER

v.

DEAN ACHESON, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT



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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 597

JOSEPH MANDOLI, ALSO KNOWN AS GUISEPPI MENDOLIA, PETITIONER

v.

DEAN ACHESON, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 31-33) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1952 (R. 34). The petition for a writ of certiorari was filed on February 19, 1952. On March 19, 1952, the Chief Justice ordered that the time for filing respondent's brief

under Rule 38 be extended to and including April 4, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

QUESTION PRESENTED

Whether a native-born American dual national, taken during minority by his Italian parents to Italy, and continuing residence there for nine years after majority before first asserting, in 1937, the right to move to the United States as a citizen, was expatriated by failure to elect American citizenship within a reasonable time after majority.

STATUTES INVOLVED

The Act of July 27, 1868, c. 249, 15 Stat. 223, R.S. 1999, now 8 U.S.C. 800, provides:

> Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed;
>
> Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs,

or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

Section 2 of the Act of March 2, 1907, 34 Stat. 1228, provided in pertinent part:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

STATEMENT

Petitioner filed suit in the United States District Court for the District of Columbia for a declaratory judgment under Section 503 of the Nationality Act of 1940 (54 Stat. 1171) to establish that he was a United States citizen (R. 18-19). The evidence adduced at the trial, at which petitioner was the only witness, may be summarized in pertinent part as follows:

Petitioner was born of Italian parents in Ravenna, Ohio, on September 17, 1907. His parents returned to Italy with him when he was only four months old. (R. 3, 5, 8-9.) When petitioner was about fifteen years of age and wanted to come to the United States, the consul at Palermo informed him that he could not do so, since he was too young and it would be necessary for another person to accompany him on the trip (R. 10).

According to the government evidence, as disclosed in petitioner's sworn application for a certificate of identity dated August 19, 1948, under

the authority of which he was permitted to come to the United States for the purpose of prosecuting his suit for a declaration of citizenship, he entered the Italian army on April 14, 1931, without protesting against induction, took the oath of allegiance to the King of Italy on May 24, 1931, and was discharged on September 5, 1931 (R. 30).[1] However, petitioner testified that his induction into the army was involuntary after an unsuccessful protest on the ground that he was an American citizen (R. 5-6); and that he did not take an oath of allegiance to the King of Italy in 1931, since he was then sick in a hospital (R. 7). Although admitting that he had signed the application for certificate of identity (R. 11), he maintained that the questions were read to him in English so that he did not understand them. He denied telling the American consul that he took an oath of allegiance to the King of Italy on May 24, 1931; denied that he did not protest against induction; and professed lack of understanding as to the meaning of paragraph 12 of the application (R. 14-15).

In 1937, when petitioner was 29 or 30 years old, he made his first attempt after reaching majority

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[1] Petitioner's Exhibit No. 3, being a certificate of the American Consulate General at Palermo, Italy, dated November 17, 1947, also stated that petitioner had taken an oath of allegiance to the King of Italy in connection with his military service from April 14, 1931, until September 5, 1931, as a result of which he had expatriated himself under the provisions of the first paragraph of Section 2 of the Act of March 2, 1907 [*supra*, p. 3] (R. 5, 28).

to come to the United States, but was refused permission because he had been in the Italian army (R. 10). Petitioner applied for an American passport at Palermo on December 29, 1944, but it was denied on February 22, 1945 (R. 7, 10, 30). He applied for the certificate of identity on August 19, 1948, and arrived in the United States on September 21, 1948 (R. 8, 30).

In ordering judgment for the respondent, the trial court made findings of fact and conclusions of law that petitioner (1) was, by birth, a dual national of the United States and Italy, (2) expatriated himself by taking an oath of allegiance to the King of Italy on May 24, 1931, (3) expatriated himself by continuous residence in Italy after attaining his majority and by his failure to elect American citizenship by returning to the United States and taking up permanent residence therein (R. 22-23, 24). The Court of Appeals unanimously affirmed the judgment (R. 34), holding that, where a dual national by birth is taken during minority to the country of his other nationality, continuous residence in such other country for an extended period, after attaining majority, results in loss of American nationality, without regard to the provisions for loss of nationality in the Act of 1907 or the subsequent Nationality Act of 1940.

DISCUSSION

1. The decision of the court below rests upon its interpretation of *Perkins* v. *Elg*, 307 U. S. 325, as holding that a dual national could expatriate himself in an extra-statutory manner,[2] merely by remaining abroad for a number of years after attaining his majority without asserting his election to retain his American citizenship. Since petitioner reached his majority on September 17, 1928, his expatriation, if he was expatriated, necessarily occurred long before the Nationality Act of 1940, 54 Stat. 1168, as the court below recognized (R. 32). Therefore, the language of the opinion below to the effect that petitioner in the post-1940 period would have been expatriated merely by living abroad long after attaining his majority, without performing any of the acts of expatriation specifically enumerated in the 1940 Act, is dictum. For the reasons set forth at pp. 38-45 of the Government's brief in *Kawakita* v. *United States*, No. 570, this Term, we believe that the court's obiter remarks that the Nationality Act of 1940 did not contain the exclusive methods of expatriation are clearly erroneous.

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[2] Section 2 of the Act of March 2, 1907, 34 Stat. 1228 (*supra*, p. 3), provided that an American citizen expatriated himself by being naturalized in, or taking an oath of allegiance to, a foreign state. There was no statutory provision that expatriation resulted from the dual national's mere continued residence abroad without electing American citizenship at majority.

2. The state of the law before 1940 is not so clear.

a. The Act of July 27, 1868, 15 Stat. 223, recognized that "the right of expatriation is a natural and inherent right of all people," and that any restriction of this right by a government officer was "inconsistent with the fundamental principles" of this government. Between 1868 and 1907, there was no statutory definition of the manner in which the right of expatriation was to be exercised. With respect to dual nationals at birth, the State Department apparently took the position at that time that there was, under recognized international law, a duty on reaching majority to elect one nationality to the exclusion of the other, and that continuous residence for an extended period of time, after majority, in the country of the other nationality resulted in the loss of United States nationality. See the Memorandum, prepared in the Department of State by its law officers, and sent by Acting Secretary of State, Robert Bacon, to the German Ambassador. Foreign Relations, 1906, p. 657, cited in *Perkins v. Elg,* 307 U. S. at 333.

Subsequently, Section 2 of the Act of March 2, 1907, provided for the expatriation of an American citizen by his being "naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state" (*supra,* p. 3), but Congress did not cover the situation of a dual national by birth who continued to reside in a foreign country long after

reaching his majority without making an election to retain his American citizenship.

Nevertheless, the State Department for some time continued to adhere to its prior view that a dual national at birth, residing during minority in the country of his other nationality, was under a duty to manifest election of United States nationality by returning to the United States on attaining majority. The Chief Clerk (Carr) to Consul Cheney, No. 142, Jan. 29, 1909, MS. Department of State, filed 11428/17, III Hackworth, *Digest of International Law* 355; Cf. Flournoy, *Dual Nationality and Election,* 30 Yale Law Journal 545, 562-564.

The view that there could be expatriation by other than the statutory methods designated in the 1907 act finds support in *United States ex rel. Rojak* v. *Marshall,* 34 F. 2d 219 (W.D. Pa.), decided in 1929. The court found, as an alternative ground of decision, that certain acts of a native-born American who, at the age of five, had returned to Czechoslovakia with his parents and remained there until four years after majority, effected expatriation. The court stated (34 F. 2d at 220): "I do not think that Congress intended to limit expatriation to cases where a citizen has been naturalized, or has taken an oath of allegiance to a foreign state." See also the dictum in *United States* v. *Husband,* 6 F. 2d 957, 958 (C.A. 2).

There is also, as the opinion below indicates, some support in the opinion of this Court in *Per-*

kins v. *Elg*, 307 U. S. 325, for the view that a dual national has a duty to return to the United States to retain United States nationality, if he resides in the country of his other nationality on reaching majority. The Court did not, in that case, have before it the question here involved. There, the Court was concerned with a person who had only United States nationality at birth but whose parents had, during her minority, been naturalized in a foreign state. The Government took the view that naturalization of the parent resulted in naturalization of the child and that, accordingly Miss Elg had lost United States nationality under the 1907 Act by being naturalized in a foreign state. The Court held that the acts of the parents could not affect the rights of their minor child and that, accordingly, Miss Elg had a right, on attaining majority, to elect American citizenship, which she exercised by returning to the United States.

In speaking of that right of election, however, the Court did quote the 1906 State Department ruling, referred to above, and did seem to equate the right of expatriation of a child born here "who may be" with one who "may become" subject to dual nationality (307 U. S. at 334). It is on this portion of the *Elg* opinion that the decision below rests, the Court of Appeals stating that, since the conclusions in the *Elg* opinion were applicable to either situation, it knew of "no reason why one who, like the [petitioner], is born Italian as well as American should have less need to elect Ameri-

can citizenship when he comes of age than one [such as Miss Elg] who is born American and acquires dual citizenship during minority." (R. 32.)

b. We are unable to attach to the language of the *Elg* opinion the significance given to it by the court below, since the problems presented by a dual national at birth were not before the Court in that case. We do not believe that, in casually equating the right of election of one who "may be" or "may become" a dual national, this Court thought it was passing on so important a question as to whether the methods of expatriation specified in the 1907 Act were exclusive. The 1907 Act covered Miss Elg's situation, if she did not elect United States nationality, but not the situation here presented. We therefore do not believe that the *Elg* decision can be deemed controlling on this issue.

Other factors, not before this Court in the *Elg* case, militate against the decision below. While, as noted above, the State Department did seem to take the view that continued residence of a dual national in a foreign state after majority resulted in loss of citizenship, it had also ruled that failure to make an election resulted in loss of the right to protection or the granting of passports by the United States Government.[8] On November 24,

[8] The Director of the Consular Service (Carr) to the Consul at Helsingfors (Davis), July 18, 1921, M. S. Department of State, file 130 P 574, III Hackworth, at 370; The Chief of the Consular Bureau (Hengstler) to Consul Dreyfus, Mar.

1923, the Department of State issued a series of instructions to American diplomatic and consular officers (quoted in *Perkins* v. *Elg*, 307 U. S. at 344-46) which indicated the Department's view that, although failure by the dual national to make an election of American citizenship after majority would not *ipso facto* result in loss of such citizenship, it would ordinarily effect a forfeiture of his right to claim protection by the United States. This distinction between loss of citizenship and the right to protection was made explicit in 1926, as shown in the following pronouncement, dated November 30, 1936, of the Department of State to the Consul General at London, quoted in III Hackworth, at 371:

> The Department over a number of years held in cases of persons who were born in the United States of alien parents and thus acquired American citizenship under Article XIV of the Amendments to the Constitution of the United States and likewise acquired the nationality of the state of which their parents were citizens or subjects under its laws

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11, 1924, MS. Department of State, file 130 H3842, III Hackworth, at 356-357; The Second Assistant Secretary of State (Adee) to Mr. Philip Spira, Oct. 24, 1916, MS. Department of State, file 130 Z88, III Hackworth, at 356; Mr. Bayard, Sec. of State, to Mr. Lee, chargé at Vienna, July 24, 1886, For Rel. 1886, 12 III Moore, *Digest of International Law*, pp. 546-547; Mr. Tripp, min. at Vienna, to Mr. Olney, Sec. of State, June 30, 1895; Mr. Adee, Act. Sec. of State, to Mr. Tripp, July 23, 1895; For Rel. 1895, I. 20-22, III Moore, at 549-550.

that, if such persons were taken abroad during their minority and resided in the country of which their parents were nationals, they were required to demonstrate their election of the nationality of the United States after attaining majority or otherwise were not held to be entitled to recognition as citizens of the United States. However, in 1926, the Department reconsidered the whole subject of election of nationality by persons having a dual nationality status and concluded that in the absence of legislative authority it was not warranted in declining to accord recognition as citizens of the United States to persons who were born in the United States of alien parents merely because they have resided abroad for protracted periods before and after attaining majority. Nevertheless, with respect to the matter of protection the Department considers the period of residence abroad of a person having dual nationality before and after attaining majority. If the period of foreign residence in the country of which he is also a national has been of long duration, it has been its practice to decline to issue passports save under exceptional circumstances.[4]

After 1926, when dual nationals residing abroad inquired as to how they could renounce their American citizenship, the Department of State

[4] It is significant, in appraising the *Elg* decision as a basis for the holding in the court below, that this Court, in deciding *Elg*, did not have before it or discuss the above-quoted 1926 ruling by the Department of State.

would customarily inform them that it was necessary that they expatriate themselves by one of the statutory acts set out in Section 2 of the Act of March 2, 1907. For instance, dual nationals were informed that expatriation would not result merely by reason of an affidavit of intention to reside permanently in Great Britain and not to preserve the party's allegiance to the United States; and that one of the two statutory acts of expatriation was required of a 27 year old Frenchman who was also American by birth, even though an oath of allegiance to France, as defined in the 1907 Act, was unknown to French law. See III Hackworth, at 373-374. We know of no instance after 1926 in which the doctrine of election-at-majority was applied by the Department of State to a dual national at birth.

A similar position to that taken by the Department of State after 1926 was asserted by the Board of Immigration Appeals, *In the Matter of R,* 1 Dec. Imm. and Nat. Laws 389, involving a woman born in the United States in 1873 of German parents who was taken to Germany three years later and who did not attempt to return until 1943. The Board overruled the argument that she was expatriated by failing to make an election after attaining her majority, stating (at p. 392):

> It has not been recognized by the Immigration and Naturalization Service or by this Board that a native-born child having dual citizenship must elect between two citizenships upon

attaining his majority; it has not been recognized by the courts; and the statements of authorities to this effect are subject to question insofar as they are based upon State Department rulings, which are determinative of the right of protection and not of citizenship, as such.

It thus could not have been clear to petitioner that he would lose his American citizenship solely by reason of continued residence in Italy after attaining majority. If petitioner, after reaching his majority in 1928, had directly asked officials of the Department of State or the Immigration and Naturalization Service whether he would lose his American citizenship solely by reason of remaining in Italy indefinitely without returning to the United States, their policy would apparently have required them to give a negative answer. The judicial decisions were divided. While, as noted above, there was some authority to the effect that the 1907 Act was not exclusive, the Court of Appeals for the Ninth Circuit held in *Leong Kwai Yin* v. *United States*, 31 F. 2d 738, decided in 1929 before the Nationality Act of 1940, that the then statutory means of expatriation of a native-born American citizen were exclusive, so that mere foreign residence for three years after majority did not effect expatriation.[5]

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[5] See also *Tomasicchio* v. *Acheson*, 98 F. Supp. 166 (D.D.C.), where on facts essentially similar to those in the instant case, the court stated that the provisions in the Nationality Act

Under the circumstances, it does seem harsh to hold petitioner to a duty of election which he would have had great difficulty in discovering. Since Congress imposed no such duty on dual nationals, when in 1940 it enacted a comprehensive measure covering loss of nationality,[6] it certainly did not consider the law well established at that time. We think the better view is that loss of nationality results only from performance of the acts specified by Congress, under the 1907, as well as the 1940 Act.[7]

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of 1940 regarding expatriation were exclusive, approved *In the Matter of R.* (*supra*, p. 13), and rejected the argument that the dual national's failure to elect American citizenship within a reasonable time after majority was tantamount to expatriation. The court held that "a person born in the United States of alien parents, who possesses dual nationality and who permanently resides during his minority in the other country that claims his allegiance, need not make any election to retain his American citizenship on reaching his majority and does not become expatriated by failure to do so." (98 F. Supp. at 173.) The Government did not appeal from the District Court's decision.

[6] At the Hearings before the Committee on Immigration and Naturalization of the House of Representatives, on H.R. 6127, superseded by H.R. 9980, 76th Cong. 1st sess., pp. 248, 267-268, it was reported that the Departments of Justice and Labor opposed a Department of State suggested provision that a dual national, taken during minority to the country of his other nationality, be required, on reaching majority, to make an election and to return to the United States if he elected American nationality. This provision was omitted from the proposed bill which ultimately became the Nationality Act of 1940.

[7] Congress is presently attempting to pass legislation on this subject. Section 350 of S. 2550, 82nd Cong., 2d sess., reported favorably in S. Rep. 1137, 82d Cong., 2d sess.,

3. The court below did not pass upon the alternative ground for the trial court's decision, *viz.*, that petitioner had expatriated himself by taking an oath of allegiance to the King of Italy after having been inducted into the Italian Army (R. 23). In view of a ruling by the Attorney General on May 8, 1951, in 41 Op. Atty. Gen. No. 16, to the effect that "the choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all," and that the oath there could "only be regarded as having been taken under legal compulsion amounting to duress," we do not contend that the decision of the court below

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Jan. 29, 1952, p. 49, provides that a person who acquired at birth the nationality of the United States and of a foreign state and who has not succeeded in legally divesting himself of the nationality of the foreign state shall lose his United States nationality by hereafter having a continuous 3-year residence in the foreign state of which he is a national by birth at any time after attaining the age of 22 years. However, loss of nationality does not occur under this section when (1) the person involved, prior to the expiration of the 3-year period, takes an oath of allegiance to the United States before a United States diplomatic or consular officer, and resides abroad solely for one of the particular reasons designated in the bill, or (2) his foreign residence has begun after he shall have attained the age of 60 years and shall have had his residence in the United States for 25 years after having attained the age of 18 years. In the corresponding House bill, H.R. 5678, 82d Cong., 2d sess., reported favorably in H. Rep. 1365, 82d Cong., 2d sess., p. 87, Sec. 350 is essentially similar to Section 350 of the Senate bill, except that expatriation of the dual national shall not be brought about by residence abroad if he had been physically present in the United States for 10 years between the ages of 10 and 25.

should be sustained upon this alternative ground of statutory expatriation by reason of the oath (see Pet. 6-7.).

CONCLUSION

The question involved does not appear to have great public importance since it concerns only those dual nationals who attained majority in the country of their other nationality some years before the enactment of the 1940 Act.

If this Court is of the opinion that the implications of the *Elg* decision are such that they support the decision of the court below, the petition for a writ of certiorari should be denied. On the other hand, if, as seems to us, the contrary considerations set forth above are more convincing, we do not object to reversal of the judgment of the court below without argument.

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